NO. 92-1528

Supreme Court, U.S.
FILED
MAR 01 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO,

Petitioner,

vs.

JOHN C. KNUCKLES, SR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Ohio improperly expanded the rule of *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), and thus improperly excluded statements as being elicited in violation of the rule in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), by determining that a police officer's statement was "interrogation" merely because it elicited a response, and without regard to the circumstances indicating that the officer did not intend to continue questioning Respondent but intended to clarify an ambiguous situation, and where the Respondent was enthusiastic about talking with police without an attorney once the subject matter was limited by Respondent's own choice.

2. Whether the determination that an interrogation was improper under *Edwards* v. *Arizona* requires the exclusion of subsequent statements, and derivative evidence, where Respondent volunteered the subsequent statements entirely on his own initiative during a non-interrogative, routine gunshot residue test conducted on his hands and which would have been performed irrespective of an assertion of the right to counsel under *Miranda* v. *Arizona*.

3. Whether the determination that an interrogation was improper under the prophylactic rule of *Edwards* v. *Arizona*, if error *arguendo*, requires the exclusion of derivative physical evidence under the "fruit of the poisonous tree" doctrine where the statements resulting after the *Edwards* violation were clearly voluntary and uncoerced.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF OHIO,

Petitioner,

v.

JOHN C. KNUCKLES, SR.,

Respondent.

Petitioner, State of Ohio, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in this case, which was entered on December 15, 1992.

OPINIONS BELOW

The decision of the Supreme Court of Ohio is reported, *State* v. *Knuckles*, 65 Ohio St. 3d 494, 605 N.E.2d 54 (1992), and is reprinted in the Appendix to this Petition at pages A-1 to A-10; the judgment entry of said Court is reprinted in the Appendix at page A-11, and its entry denying rehearing on January 27, 1993, is reported at 66 Ohio St. 3d 1405, 605 N.E.2d 1262, and is reprinted in the Appendix at page A-12. The decision of the Court of Appeals for the Twelfth Appellate District of Ohio is unreported and is reprinted in the Appendix at pages A-13 to A-33; the judgment entry of said Court is reprinted in the Appendix at page A-34.

JURISDICTION

The judgment of the Supreme Court of Ohio was filed on December 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and Rules 10(b) and (c) of the Rules of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The decision of the Supreme Court of Ohio is based exclusively on the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> Section 1. * * * [N]or shall any state deprive any person of life, liberty, or property, without due process of law; * * *.

STATEMENT OF THE CASE

A. Facts.

On January 30, 1989, the murder of Bobby Bennett was discovered at his home in Hamilton, Ohio; the victim was shot twice in the head at close range with a semi-automatic weapon, leaving two fired .25 caliber shell casings at the scene. Bennett's former brother-in-law, Respondent John C. Knuckles, Sr., was identified as being the last person seen with Bennett at a gas station immediately before the murder, and upon knowledge of outstanding warrants for Respondent's arrest for thirty-six counts of passing bad checks, Hamilton police sought to locate and question him as to the circumstances of his last encounter with the victim.

At approximately midnight, Respondent was arrested on the bad check charges (after attempting to evade arrest by giving a false name and identification card) and was taken to the detective bureau at police headquarters, where detectives commenced an interview with a warning as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Respondent initially stated that he wanted to speak to an attorney. That statement was followed by a detective's statement, "We wanted to talk to you about Bobby Bennett." This detective testified that it was not his intention to continue the questioning of Respondent when he invoked the right to counsel, but rather it was the detective's intent to clarify the situation presented, as Respondent's arrest was for bad checks but the officers wanted to talk to Respondent only as to his murdered former relative, and no one had yet advised him of that fact. Further, it was this detective's routine practice to inform an individual of the purpose of any interview.

Immediately upon the detective's statement Respondent replied, "Oh, I thought you wanted to talk about the bad check warrants. I don't want to talk to you about the bad checks, but I will talk to you about Bobby Bennett's death; I love that man. As a matter of fact, I have got a couple theories on who may have done it that you guys would prob-

ably be interested in." Thereafter, Respondent signed a rights waiver form and agreed to talk to the detectives about Bennett's demise; in the conversation that followed, Respondent explained his version of the encounter with Bennett at the gas station, offered a theory that Bennett may have been killed by a jealous girlfriend's husband, and explained his whereabouts on the day in question. Respondent indicated that he was looking for Bennett that day to borrow money and acknowledged a drug habit, but no incriminating admissions were made concerning the murder.

Upon another detective's entry into the room with a kit for the purpose of testing Respondent's hands for gunshot residue, Respondent declared that the test was unnecessary, as he had fired a weapon that night prior to his arrest. In answer to follow-up inquiry as to where this had taken place, Respondent told police that he had fired a gun that was in the trunk of his car, (a .25 caliber semi-automatic weapon which the police had already obtained by a search warrant), out at his residence; he then urged the officers to go out to his residence to verify what he was saying. They did so, and with the consent of Respondent and his wife, seven fired shell casings were found on the surface of the ground; and reluctantly, but upon the insistence of Respondent's wife, police dug up a bullet which resulted in incriminating scientific proof that the firearm found in Respondent's car trunk was in fact the murder weapon, which had been subsequently altered by tampering with the firearm's barrel, firing pin, and breech face.

After the police interview was terminated, Respondent saw the weapon and vials of cocaine seized from the trunk of his car on the searching officer's desk and remarked, "If that gun killed Bobby Bennett, you have got your man, but the gun won't match. It's not the gun." However, the weapon was scientifically matched; a firearms identification expert positively identified the two fired shell casings found at the murder scene as having been fired in the weapon prior to its attempted alteration, and the seven fired casings found on the

surface of the ground at Respondent's residence were identified as having been fired from the weapon after its attempted alteration, with scratch marks on the weapon's breech face being identified on these casings. Additionally, the two bullets recovered from the victim's head, shown to have possibly been fired from this weapon before the alteration of its barrel prevented conclusive identification, were identical mates to the bullet dug from the ground at Respondent's residence. Upon these facts presented at trial, as more fully articulated in the opinion of the Court of Appeals, Twelfth Appellate District of Ohio, (Appendix A-13 through A-33), Respondent was convicted by a jury of aggravated murder with specifications, aggravated robbery, tampering with evidence, and drug abuse in violation of Ohio Revised Code Sections 2903.01(B), 2911.01(A)(1), 2921.12(A), and 2925.11(A), respectively, and sentenced to a term of life imprisonment for the aggravated murder, a consecutive term of three years for use of the firearm, and additional, consecutive terms totalling not less than twelve nor more than twenty-seven years on the remaining charges.

B. How the federal questions were raised below.

Prior to trial, Respondent filed a motion to suppress his statement and any fruits thereof, predicated on the Fifth and Fourteenth Amendments to the United States Constitution and citing the rules in *Miranda* v. *Arizona*, 384 U.S. 478 (1966), and *Edwards* v. *Arizona*, 451 U.S. 477 (1981). The trial court, accepting the unrebutted testimony of the detectives, overruled the motion and admitted all statements into evidence. Respondent raised the constitutional issues on appeal to the Court of Appeals, Twelfth Appellate District of Ohio, which affirmed the conviction to a 2 to 1 vote, finding specifically that the statement of the police officer was not interrogation as defined in *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), and thus did not violate the rule in *Edwards* v. *Arizona*, *supra*.

On appeal to the Supreme Court of Ohio, and by a 5 to 2 vote, the conviction was reversed and the case was remanded for further proceedings on the single ground that the police violated the rule in *State* v. *Williams*, 6 Ohio St. 3d 281, 6 OBR 345, 452 N.E.2d 1323 (1983), (a case resting squarely on the Fifth and Fourteenth Amendments to the United States Constitution as judicially construed in *Edwards* v. *Arizona*, *supra*), by engaging in interrogation as defined in *Rhode Island* v. *Innis*, *supra*.[1] Two justices of the Court vigorously dissented, reasoning that while the syllabus paragraphs of the majority's opinion correctly stated the law, the majority failed to properly apply these rules of law to the facts of the instant case; the dissenting justices would agree with the trial judge and two court of appeals judges who found that the statement, "We wanted to talk to you about Bobby Bennett," was not "further interrogation" under the circumstances. *State* v. *Knuckles*, *supra*, at 498-499, 605 N.E.2d at 57-58, (Holmes, J., dissenting); *Id.*, at 499-501, 605 N.E.2d, at 58-59 (Resnick, J., dissenting).

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[1] There are no valid, independent state grounds for the decision below. It is the settled rule in Ohio that its Supreme Court speaks as a court only through the syllabi of its cases, see *Ohio* v. *Gallagher*, 425 U.S. 257, 259 (1976), and the two syllabus paragraphs in the present case clearly set forth principles of federal constitutional law. Paragraph two of the syllabus cites *Rhode Island* v. *Innis*, *supra*; and while paragraph one of the syllabus cites and follows paragraph four of the syllabus in *State* v. *Williams*, *supra*, a review of the *Williams* decision reveals that it is based exclusively on federal constitutional law as judicially construed by this Court in *Edwards* v. *Arizona*, *supra*. See *Texas* v. *Brown*, 460 U.S. 730, 732 n. 1 (1983). Indeed, *State* v. *Williams* was decided after this Court, in *Williams* v. *Ohio*, 452 U.S. 935 (1981), had remanded that case to the Court of Appeals of Ohio, Hamilton County, for reconsideration in light of *Edwards* v. *Arizona*; after the appellate court had again affirmed the conviction, the Supreme Court of Ohio decided that an *Edwards* violation was harmless beyond a reasonable doubt, citing only *Edwards* v. *Arizona*, *Rhode Island* v. *Innis*, and *Harrington* v. *California*, 395 U.S. 250, 254 (1969). See *State* v. *Williams*, *supra*, 6 Ohio St. 3d, at 290-291, 452 N.E.2d, at 1333-1334.

Further, the Ohio syllabus rule does not foreclose this Court from consulting the only opinion filed with the syllabus in order to understand the

REASONS FOR GRANTING THE WRIT

I. The decision of the Supreme Court of Ohio, in determining that a police officer's statement was interrogation because it elicited a response, without regard to the circumstances indicating that the officer's intent was to clarify an ambiguous situation and terminate questioning and that the Respondent was enthusiastic about talking with police once the subject matter was limited by Respondent's own choice, was decided in a way that conflicts with the applicable decisions of this Court and the decisions of other state courts of last resort, and raises an important question of federal law which has not been, but should be, settled by this Court.

While its two syllabus paragraphs are correct statements of basic federal constitutional law, the decision of the Supreme Court of Ohio misapplies the concept of "interrogation" to include any statement or remark of a police officer which "invited a response," *State* v. *Knuckles*, 65 Ohio St. 3d 494, at 497, 605 N.E.2d 54, at 56 (1992), *i.e.*, struck a responsive chord. In *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), however, this Court rejected the Rhode Island Supreme Court's analysis which equated an officer's comments which "struck a responsive chord" with interrogation; the Court made it clear that simply striking a "responsive chord" and in that sense the suspect being "subjected to 'subtle compulsion'

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syllabus, see *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 441-443 (1952), and *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-567 (1977). The opinion of Justice Herbert Brown below makes it clear that federal constitutional law is the actual, exclusive basis for decision, see *Zacchini*, *id.*, at 566-567, and *Michigan* v. *Long*, 463 U.S. 1032, 1039 (1983).

Thus, the doctrine expressed in *Jankovich* v. *Toll Road Comm'n.*, 379 U.S. 487 (1965), is not applicable; nor is it necessary to remand this case to the Supreme Court of Ohio for clarification of its opinion, see *Ohio* v. *Gallagher*, *supra*. Moreover, any doubt should be resolved in favor of this Court's jurisdiction, see *Michigan* v. *Long*, *supra*, at 1040-41.

* * * is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police *that they should have known were reasonably likely to elicit an incriminating response.*" *Innis, id.*, at 303, (emphasis added).

The Ohio Supreme Court's application of *Edwards* v. *Arizona* in the case at bar closely approaches the Rhode Island Supreme Court's analysis which was rejected in *Innis* by focusing solely on whether the Respondent responded to the officer's words, irrespective of the circumstances which indicate there was no interrogation by the police officer's remark.

The decision below also fails to consider the totality of the circumstances that Respondent was arrested on bad check warrants and, from his point of view, had no idea that the police wanted to talk with him about the Bennett homicide but enthusiastically expressed his desire to talk about that subject, secure in the knowledge (as he then believed) that he had altered the murder weapon's points of identification. The exclusionary rule is extended here to penalize police for being truthful with Respondent in a statement that is clearly a withdrawal from questioning after the right to counsel had been invoked under ambiguous circumstances and made only to clarify the situation. The case squarely presents the question left undecided in *Smith* v. *Illinois*, 469 U.S. 91, at 99-100 (1984): ("Our decision is a narrow one. We do not decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal as a result of *events proceding the request* * * *, nor do we decide the consequences of such ambuguity or equivocation.") (Emphasis added.)

In *Edwards* v. *Arizona*, *supra*, the Court held that where the accused has "expressed his desire to deal with the police only through counsel, [he] is not subject to further *interrogation* by the authorities until counsel has been made available to him, unless the accused himself initiates further com-

munication, exchanges, or conversations with the police." *Id.*, *at 484-486*, (*emphasis* added.) One year earlier, the Court had defined the concept of "interrogation" involved in *Miranda* cases as being "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island* v. *Innis*, *supra*, at 301. This test focuses primarily, but not exclusively, on the perceptions of the suspect; it also requires a court to consider the true nature of the officer's words and actions and the attending circumstances to determine the objective question whether *the police* should know the words or actions are reasonably likely to elicit an incriminating response, *id.* Under the *Innis* formulation, while the officer's actual intent is not dispositive, it is relevant to the issue whether there was an interrogation. *Id.*, at 301 n. 7.

By focusing solely on the fact that the officer's words produced a response, and by disregarding as irrelevant the actual intent of the officer to clarify the ambiguous situation presented, the Ohio Supreme Court's decision denies the true import of the circumstances which indicate there was no interrogation. The statement in this case, "We wanted to talk to you about Bobby Bennett," was an utterance made by an officer who was ending the encounter after there was an invocation of the right to counsel. This officer testified that he did not intend to continue the questioning; moreover, the officer testified he intended to clarify an ambiguous situation, whereby Respondent had been arrested on bad checks warrants but the police sought to ask him about his being seen with Bennett, and the subject matter had not been brought up by anyone as of that time. When the police officer uttered his statement, he had no way of knowing that Respondent would, for his own purposes, jump at the chance to offer false information about Bennett's demise; the statement "invited a response" (*State* v. *Knuckles*, *supra*, at 497, 605 N.E.2d, at 56) only because Respondent "welcomed this comment as an opportunity to mislead the police investigation through his

deceptive theories on who shot the victim. [Respondent's] subsequent incriminating remarks were more likely evoked by his desire to lead the police astray than they were by his perception that the officer wanted him to speak." *State* v. *Knuckles*, *supra*, at 499, 605 N.E.2d, at 57, (Holmes J., dissenting). See also dissenting opinion per Resnick, J., *id.*, at 500, 605 N.E.2d, at 58: ("Clearly, defendant responded enthusiastically when the Bennett murder was mentioned. It may be easily deduced that defendant obviously believed he had outwitted the authorities, and was anxious to perfect the deception").

The dissents below recognize that the perceptions of the suspect are the primary focus under the *Innis* test, *id.*, at 301, and the circumstances and intent of the Respondent are indeed relevant here. Respondent was a forty-two-year-old former deputy sheriff whose perception was that he was under arrest for passing bad checks and that he would not be implicated in the murder. He was skilled in firearms repair and familiar with police procedures, including the *Miranda* rules; and having previously made a skillful attempt at altering the murder weapon's critical points of identification, he seized upon the detective's remark to volunteer information to lead the police away from suspecting him, secure in his belief that the firearm in his possession could not be linked to the murder. Respondent's perception of the remark was not that it asked him to speak; his perception was that it opened the door to his own artifice.

At most, the statement retrospectively advised Respondent as to the intended subject matter of the terminated interview, such advice not required by this Court's decisions, see *Colorado* v. *Spring*, 479 U.S. 564 (1987), but certainly not prohibited. The statement at issue was neither express questioning nor a psychological ploy which was likely to " 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination," *Innis*, *supra*, at 309, (quoting *Miranda*, *supra*, at 457); it was not a "parting shot" at Respondent which posited possible

defenses or mitigation by way of a "direct challenge to the defendant to answer questions then, without an attorney, or lose his chance to explain * * *." *Cf. State* v. *Dedrick*, 132 N.H. 318, 546, A.2d 428, at 433 (1989) (Thayer, J., dissenting). These facts involved none of the "badger[ing]" that the safeguard was designed to prevent, see *Oregon* v. *Bradshaw*, 462 U.S. 1039, at 1044 (1983), nor can it be said that there was a "wearing down and confusing" of Respondent, see *Smith* v. *Illinois*, *supra*, at 98. Unlike a statement that would involve compulsion, (*e.g.*, "You *have to* talk to us," see *Smith* v. *Illinois*, *id.*, at 99 n. 8, and *Edwards* v. *Arizona*, *supra*, at 479), this statement did not reasonably indicate the officer's continued intention to pursue a line of questioning. Nor is the statement one that "asked for a response requiring him to communicate an express or implied assertion of fact or belief" and thus confronted Respondent with "the 'trilemma' of truth, falsity, or silence," see *Pennsylvania* v. *Muniz*, 496 U.S. 582, at 597 (1990). Simply stated, the officer's statement did not "have * * * the force of a question on the accused," see *Pennsylvania* v. *Muniz*, *id.*, at 601, quoting *Harryman* v. *Estelle*, 616 F.2d 870, 874 (5th Cir. 1980).

If Respondent truly desired to have counsel for all purposes, the statement would have evoked no response at all. The enthusiastic response by which Respondent unequivocally limited his invocation of the right to counsel to the bad check charges but affirmatively expressed his willingness to talk about Bennett's death, see *Connecticut* v. *Barrett*, 479 U.S. 523 (1987), was completely unforeseen and was neither tricked nor cajoled out of Respondent; when the police officer uttered his statement, he had no way of knowing that Respondent would gladly talk about Bennett while standing firm on his rights as to the thirty-six bad checks. To disregard Respondent's conscious, express choice to distinguish between the investigations and "[t]o hold that a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be to 'imprison a man in his privileges and call it the Constitution.' " *Michigan* v. *Harvey*, 494 U.S. 344, 353

(1990), quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 280 (1947). This Court has declined to do so, *Michigan* v. *Harvey*, *supra*, yet the Ohio Supreme Court has done so.

Incredibly, the Court below in its decision stated: "The bright-line rule established in these cases eliminates the need for *ad hoc* determinations by the courts regarding what communications with a defendant are permissible once counsel is requested." *State* v. *Knuckles*, *supra*, at 497, 605 N.E.2d, at 56. The Court below thus misperceives *Edwards*' so-called "bright-line rule" to allow courts to be relieved of any duty to determine, on a case-by-case basis, whether a communication made by police to a defendant who has invoked his right to counsel is interrogation. This abdication of judicial responsibility for determining the *Innis* question runs afoul of *Innis* itself, (a case in which the right to counsel had been asserted prior to the "off-hand" remarks between police officers which were overheard by the suspect and elicited a response), and at least one other decision of this Court decided subsequent to *Edwards*, see *Arizona* v. *Mauro*, 481 U.S. 520 (1987). Courts regularly make the mixed fact/law determination whether any give communication is "interrogation," see *Arizona* v. *Mauro*, *id.*; see also *Pennsylvania* v. *Muniz*, *supra*. The *Edwards* rule clearly does not impose anti-contact or anti-communication obligations upon the police after a suspect invokes his right to counsel; it bars "further interrogation" only.

The Ohio Supreme Court's decision is also in conflict with decisions of numerous other state courts of last resort,[2] where

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[2] The Supreme Courts of Illinois, New Hampshire, Oregon, Pennsylvania, and Wisconsin, among others, have found that statements similar to the one in the case at bar were not the functional equivalent of interrogation. See *People* v. *Easley*, 148 Ill. 2d 281, 592 N.E.2d 1036 (1992) (where prison inmate under investigation for the murder of a prison superintendent had invoked his *Miranda* rights, a prison investigator's statement to the effect that the inmate was identified as having committed the murder did not rise to the level of being the functional equivalent of interrogation under *Innis*, although the substance of the statement concerned the death); *State* v.

comparable statements addressed directly to the defendant but not having the force of a question on the accused were determined not to be interrogation or its functional equivalent under *Innis*. It is apparent from those decisions that Ohio stands alone in interpreting the *Edwards* "bright-line" rule as prohibiting all communication (except "routine booking questions," *Knuckles*, *supra*, at 497, 605 N.E.2d, at 56), once counsel is requested, and eliminating the need for case-by-case determinations by the courts regarding what communications with a defendant are interrogation or its functional equivalent, *id.*

This Court has cautioned other courts against extending *Miranda* or *Edwards* further than originally intended:

Guajardo, 135 N.H. 401, 605 A.2d 217 (1992) (after sexual assault suspect had invoked his *Miranda* rights of counsel and to remain silent, an officer's statement during a collection of evidence procedure to the effect that two additional charges would probably be filed against him was not the functional equivalent of interrogation), and *State* v. *Dedrick*, 132 N.H. 218, 226, 564 A.2d 428, 428 (1989), *cert. denied*, 494 U.S. 1007 (1990) (interrogating officer's statement after murder suspect requested counsel, despite being termed by the officer as a "parting shot," not equivalent to interrogation in violation of *Edwards*); *Commonwealth* v. *Brantner*, 486 Pa. 518, 527, 406 A.2d 1011, 1015 (1979) (booking officer's greeting, "Hi, Harry. Apparently we have a little problem, and I need to take your photograph," although making mention of suspect's "problem," was not of an inquisitive nature and no response was called for; the response, "Yeah, I shot those two people" was gratuitous); *State* v. *Davis*, 313 Or. 246, 260, 834 P.2d 1008, 1016 (1992) (where suspect in Oregon robbery was arrested in Mississippi, discussion by police concerning extradition was not interrogation because the statements were neither phrased as questions nor were they intended by police or understood by defendant as an attempt to elicit any information; statements possessed "none of the earmarks of a question or a surreptitious attempt to get information from defendant about the robbery"); and *State* v. *Cunningham*, 144 Wis.2d 272, 423 N.W.2d 862 (1988) (where arresting officer displayed suspect's revolver in the suspect's presence and remarked to another officer, "This is apparently what Mr. Cunningham was running into the bedroom for," such words and conduct are not the functional equivalent of interrogation if an objective observer, with same knowledge of suspect as arresting officer, could conclude that such remarks and conduct would not be likely to elicit an incriminating response, *i.e.*, have the force of a question on the suspect).

> "In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions, *Miranda* and *Edwards*: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment."

Arizona v. *Mauro*, *supra*, at 529-530. With that admonition in mind, there was clearly nothing of a coercive nature in the simple statement, "We wanted to talk to you about Bobby Bennett;" at best, it merely struck a responsive chord, but doing so clearly does not equate with "interrogation" under *Rhode Island* v. *Innis*. The Ohio Supreme Court, by wrongly deciding the *Innis* question, has improperly extended *Edwards* beyond its original intent to bar the completely voluntary statements of Respondent herein, given after full warning and express waiver of the rights delineated in *Miranda*.

II. The determination that an interrogation was improper under *Edwards* v. *Arizona* does not require the exclusion of subsequent statements, and derivative evidence, where Respondent volunteered the subsequent statements entirely on his own initiative during a non-interrogative, routine gunshot residue test conducted on his hands which would have been performed irrespective of an assertion of the right to counsel under *Miranda* v. *Arizona*; suppression of such statements and derivative evidence would conflict with decisions of other state courts of last resort and the application decisions of this Court.

The decision of the Supreme Court of Ohio fails to address an issue, briefed by the parties and extant in the record herein, involving the Respondent's unsolicited declarations made when the officer entered the room with a kit to swab his hands for gunshot residue. Indeed, the only incriminating evidence which can be gleaned from any of Respondent's statements is the physical evidence derived solely from this exchange between Respondent and the police regarding the gunshot residue test. This was a physical test which does not involve the Fifth Amendment privilege against self-incrimination as it does not involve testimonial compulsion, see *Schmerber* v. *California*, 384 U.S. 757 (1966); the police conduct of such physical tests, and inquiries which are necessarily attendant to such procedures, do not constitute interrogation in the *Miranda* sense, see Part IV of the opinion in *Pennsylvania* v. *Muniz*, *supra*, at 602-605, (horizontal gaze nystagmus test and sobriety tests and inquiries attendant thereto do not constitute interrogation), and *South Dakota* v. *Neville*, 459 U.S. 553, 564 n. 15 (1983), (drawing analogy to a "police request to submit to fingerprinting or photography" and holding the remarks and conduct of police incident to blood alcohol testing procedures were not "interrogation within the meaning of *Miranda*"). Because such a trace evidence test is "normally attendant to arrest and custody" in cases of homicide by shooting, it is expressly excluded from

the definition of interrogation, see *Rhode Island* v. *Innis*, *supra*, at 301. Thus, while the rule in *Edwards* v. *Arizona* would bar further interrogation after the right to counsel is invoked, this gunshot residue test was not "interrogation," and it is abundantly clear that the procedure was permissible irrespective of whether *Edwards* applies to bar the Respondent's earlier statements.

Other state courts of last resort have held that statements volunteered in the course of physical tests or procedures are admissible as they do not involve interrogation as intended under the *Miranda* rules. On facts quite similar to the case at bar, in *People* v. *Pierson*, 670 P.2d 770 (Colo. 1983), the Supreme Court of Colorado held that a statement made by a homicide suspect while his hands were being swabbed by police in a gunshot residue test and which purported to be an innocent explanation for any gunpowder residue found on the test was volunteered and admissible. Other similar recent decisions are in accord with *Pierson*.[3]

It is likewise clear that the unsolicited, spontaneous remarks of Respondent when faced with the routine test opened up a new line of conversation with the police about having fired a weapon; thus, even if *Edwards* v. *Arizona* had barred any preceding interrogation, the Respondent himself had "initiate[d] further communication, exchanges, or conversations with the police," *id.*, at 484-485, and consequently invited further discussion with the police about this subject

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[3] See *King* v. *Commonwealth*, 416 S.E.2d 669 (Va. 1992) (after the accused invoked right to counsel, incriminating statements made spontaneously during the police execution of certain orders to collect forensic evidence were not obtained in violation of *Edwards*); *State* v. *Boykin*, 432 N.W.2d 60 (South Dakota 1988) (suspect's comment during strip search and taking of clothing for evidentiary purposes that his shoes may match footprints at the crime scene, not made in response to interrogation); *Day* v. *State*, 306 Ark. 520, 816 S.W.2d 852 (1991) (arresting officer's frisk for weapon was not interrogation; accused's spontaneous statement that the weapon was located in his motor vehicle was admissible).

matter. Having initiated "further communication, exchanges, or conversations," Respondent should not be allowed to complain that a follow-up question was asked about his purportedly innocent explanation for any gunpowder residue found on the test, as *Edwards* expressly allows such questioning after conversation is initiated by the accused. Assuming *arguendo* that prior statements should be suppressed under *Edwards*, that should not preclude the admissibility of subsequent volunteered declarations under a "cat out of the bag" theory of suppression which this Court has expressly discredited in *Oregon* v. *Elstad*, 470 U.S. 298 (1985). Nor may Respondent complain as to the collection of derivative evidence, ultimately incriminating, inasmuch as he insisted that the police go to his residence and verify his purportedly innocent explanation; unawareness of all the potential adverse consequences of information divulged to the police does not transform a voluntary interview into one that is presumptively involuntary under *Miranda*, see *California* v. *Beheler*, 463 U.S. 1121, 1125-1126, n. 3 (1983), and *Oregon* v. *Elstad*, *supra*, at 317. "This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Elstad*, *id.*, at 316; *Connecticut* v. *Barrett*, *supra*, at 530. His consent to gather the evidence at his residence thus meets the voluntariness standard set forth in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973).

To the extent that the Supreme Court of Ohio utterly failed to address this significant issue, this Court should resolve it.

III. The issue whether derivative physical evidence must be excluded under the "fruit of the poisonous tree" doctrine where an interrogation is deemed to be improper under the prophylactic rule of *Edwards* v. *Arizona*, but where the statements made after the *Edwards* violation were patently voluntary, raises an important question of federal law which has not been, but should be, settled by this Court.

The decisions in *Miranda* v. *Arizona* and *Edwards* v. *Arizona* require suppression of statements taken in violation of the prophylactic rules set forth in those cases, even if the statements made thereafter are otherwise voluntary under Fifth and Fourteenth Amendment standards. However, the question remains, and it has never been decided by this Court, as to whether physical evidence yielded from statements which the Court would deem to be taken in violation of the prophylactic, "bright-line" rules of *Miranda* or *Edwards* but which were otherwise uncoerced and voluntary must be suppressed as "fruit of the poisonous tree," see *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

The Court was previously presented with this issue in *Rhode Island* v. *Innis*, *supra*,[4] but the Court's determination in that case that the police did not engage in interrogation within the meaning of *Miranda* rendered that question moot. The issue was once again presented in *New York* v. *Quarles*, 467 U.S. 649 (1984), but that case was also decided on narrower grounds, the Court recognizing a "public safety" exception to *Miranda* to hold that officers did not violate a suspect's rights by questioning him about his abandoned gun; Justice O'Connor, concurring in the result, would have held that the gun should not be suppressed as the tainted "fruit" of the *Miranda* violation. *Quarles*, *id.*, at 665-674. As recently as the Court's denial of certiorari in *Patterson* v. *United States*, 485

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[4] See Brief for the Petitioner, *Rhode Island* v. *Innis*, No. 78-1076, at pages 29 *et seq.*

U.S. 922 (1988), Justice White in dissent acknowledged that the question of admissibility of physical evidence yielded from a *Miranda* violation has been unresolved by this Court and that the state and federal courts have been divided on the question. See also *Massachusetts* v. *White*, 439 U.S. 280 (1978), where the Court was evenly divided on the issue of the admissibility of physical evidence obtained from an interrogation that violated *Miranda*. This issue, having gone without definite resolution for almost three decades, is ripe for resolution by this Court and is presented in the case at bar (assuming *arguendo* that the Ohio Supreme Court majority was correct in finding an *Edwards* violation).

The decision in *Miranda* v. *Arizona* itself expressly limited its holding to the admissibility of statements obtained in custodial interrogation. *Id.*, 384 U.S., at 439. Since *Miranda*, the Court has considered whether derivative evidence obtained as "fruits" of statements taken in violation of *Miranda* should be suppressed on only two other occasions — in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and in *Oregon* v. *Elstad*, 470 U.S. 298 (1985). Although both cases allowed the admissibility of testimonial fruits of a noncoercive *Miranda* violation, (the "fruit" in *Tucker* being the testimony of another whose identity was divulged in an unwarned statement, and the "fruit" in *Elstad* being the accused's own statement taken with fully-warned *Miranda* compliance but after an initial incriminating statement made without benefit of *Miranda* warning), these two decisions strongly intimate that nontestimonial fruit would not be excluded as fruit of the poisonous tree, so long as the statements taken in violation of *Miranda's* prophylactic rule were otherwise voluntary under Fifth and Fourteenth Amendment standards.[5]

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[5] While the Court in *Tucker* expressly declined to decide "the broad question whether evidence derived from statements taken in violation of *Miranda* must be excluded," *id.*, at 447, the Court in *Elstad*, employing the logic of *Tucker*, repeatedly cast its analysis in terms of the "fruits" of a *Miranda* violation, see *Elstad*, *id.*, at 306, 307, 308, [a fact lamented in the dissenting opinion therein, *id.*, at 319, n. 2 (Brennan, J., dissenting)].

Under the reasoning in *Tucker* and *Elstad*, a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, where the "fruit of the poisonous tree" doctrine originates; the purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, as prohibited by the very language of the Amendment, no matter how probative their "fruits." The *Miranda* exclusionary rule, on the other hand, sweeps more broadly than the Fifth Amendment itself, and may be applied even in the absence of a Fifth Amendment violation; the prophylactic warnings required by *Miranda* were not themselves rights protected by the Constitution, but were simply measures to safeguard the Fifth Amendment privilege against self-incrimination. *Tucker*, *supra*, at 445-446; *Elstad*, *supra*, at 304-305. Thus, the *Miranda* exclusionary rule may require suppression of unwarned but otherwise voluntary statements. *Elstad*, *id.*, at 306-307. Under such circumstances, the Court reasoned, a procedural *Miranda* transgression did not require its fruits to be discarded as "inherently tainted" in the absence of actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will. *Elstad*, *id.*, at 307-309.

The Court has never held that statements taken in violation of the prophylactic rule of *Miranda*, or its corrolaries in *Edwards* and *Michigan* v. *Jackson*, 475 U.S. 625 (1986), (applying the bright-line rule of *Edwards* where the Sixth Amendment right to counsel has been invoked), are barred for all purposes. While the Court has applied the exclusionary rule to bar the use of statements taken in violation of *Miranda*, *Edwards*, or *Jackson* in the prosecution's case-in-chief, it has allowed such statements, if uncoerced and voluntary, to be used for impeachment purposes; see *Harris* v. *New York*, 401 U.S. 222 (1971), (statement obtained after inadequate *Miranda* warning), *Oregon* v. *Hass*, 420 U.S. 714 (1975), (statement obtained after request for counsel was ignored, as in *Edwards*), and *Michigan* v. *Harvey*, 494 U.S. 344 (1990), (statement obtained after Sixth Amendment right to counsel had

been invoked, as in *Jackson*). As the Court noted in *Michigan* v. *Harvey*, *id.*, at 351, the Court has mandated exclusion of reliable and probative evidence for *all* purposes only when it is derived from involuntary statements, see *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979) (compelled incriminating statements held inadmissible for impeachment purposes), and *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) (same).

Following *Elstad*, federal and state courts have almost uniformly ruled that the nontestimonial fruits of a violation of *Miranda* or *Edwards* are admissible in a criminal trial,[6] reasoning as in *Elstad* that the poisonous tree doctrine will be applicable only if there is evidence of actual coercion or other circumstances designed to overbear the suspect's will. See *e.g.*, *United States* v. *Gonzales-Sandoval*, 894 F.2d 1043, 1047-1048 (9th Cir. 1990) ("where there is no evidence of coercion or a denial of due process in elicitation of the statements, the object of the fifth amendment exclusionary rule — assuring trustworthiness of evidence introduced at trial — is not served by barring admission of the derivatively obtained evidence"); *United States* v. *Sangineto-Miranda*, 859 F.2d 1501, 1518 (6th Cir. 1988); and *State* v. *Wethered*, 110 Wash. 466, 472-475, 755 P.2d 797, 800-802 (1988). A most recent example is the decision of the Supreme Court of Illinois in *People* v. *Winsett*, ___ Ill. ___, ___ N.E.2d ___, 61 U.S.L.W. 2352 (Nov. 19, 1992) (No. 73042), where that court carefully analyzed the decisions in *Tucker*, *Elstad*, and *Hass*, to conclude that these decisions, taken together, authorize the admission of derivative fruits of a statement obtained in violation of *Edwards*'s prophylactic rule, but which statement was otherwise patently voluntary and uncoerced.

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[6] See discussion in Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, at 835-837 (1992), and cases cited therein.

Since this Court's denial of certiorari in *Patterson* v. *United States*, *supra*, state courts remain divided on the issue,[7] and this division should be resolved by this Court with a grant of certiorari herein.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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[7] While the weight of federal and state authority has followed *Elstad*, some state courts have suppressed nontestimonial fruits of a *Miranda* or *Edwards* violation; see *State* v. *Gravel*, 135 N.H. 172, 601 A.2d 678, 682-686 (1991) (suppressing tangible evidence found upon execution of search warrant which was issued upon probable cause developed in part from the defendant's statements obtained in violation of *Miranda*; but see dissenting opinion per Thayer, J., *id.*, 601 A.2d, at 686-688); *State* v. *Williams*, 162 W.Va. 309, 249 S.E.2d 758, 764 (1978) (holding that physical evidence located as a result of statements obtained in violation of *Miranda* was inadmissible); and *State* v. *Miller*, 300 Or. 203, 709 P.2d 225, 241 (1985), *cert. denied*, 475 U.S. 1141 (1986) (police officer's failure to honor suspect's request for counsel required suppression of derivative physical evidence, unless evidence was admissible on an independent ground, *e.g.*, the inevitable discovery rule).

APPENDIX

THE STATE OF OHIO, APPELLEE, *v.* KNUCKLES, APPELLANT.

[Cite as *State* v. *Knuckles* (1992), 65 Ohio St.3d 494.]

Criminal law—once an accused invokes his right to counsel, all further custodial interrogation must cease and may not be resumed in the absence of counsel—Interrogation may be resumed, when—"Interrogation," defined.

1. Once an accused invokes his right to counsel, all further custodial interrogation must cease and may not be resumed in the absence of counsel unless the accused thereafter effects a valid waiver or himself renews communication with the police. (*State* v. *Williams* [1983], 6 Ohio St.3d 281, 6 OBR 345, 452 N.E.2d 1323, paragraph four of the syllabus, followed.)

See: West's Ohio Digest, Criminal Law [Key] 412.2(4).

2. When a statement, question or remark by a police officer is reasonably likely to elicit an incriminating response from a suspect, it is an interrogation. (*Rhode Island* v. *Innis* [1980], 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297.)

See: West's Ohio Digest, Criminal Law [Key] 412.1(4).

(No. 91-1838—Submitted October 14, 1992—Decided December 15, 1992.)

APPEAL from the Court of Appeals for Butler County, No. CA89-11-159.

Shortly after midnight on January 31, 1989, defendant, John C. Knuckles, Sr., was arrested on an outstanding warrant for writing bad checks. This arrest, however, was admittedly a pretext for bringing him in to talk about the murder of

Bobby Bennett, for which the defendant was a suspect. He was taken to Hamilton police headquarters where he was given his *Miranda* warning.

The defendant, a former sheriff's deputy, acknowledged that he understood his rights and immediately requested an attorney. Instead of ending the questioning, one of the three police officers present said, "We want to talk to you about Bobby Bennett."

The defendant responded, "Oh, I thought you wanted to talk about the bad check warrants * * *. I don't want to talk about the bad checks, but I will talk to you about Bobby Bennett's death." He then signed a *Miranda* waiver and spoke to the police for two hours. During this period he made incriminatory statements which assisted the police in locating evidence used against him in his trial.

The defendant was indicted for aggravated murder, aggravated robbery, tampering with evidence, and drug abuse. A motion to suppress defendant's statements was filed, but was overruled after a suppression hearing. A jury found the defendant guilty on all counts and he was sentenced to life imprisonment.

The Butler County Court of Appeals affirmed the conviction, finding, *inter alia*, that the trial court properly overruled defendant's motion to suppress.

This cause is before this court upon a motion for leave to appeal.

John F. Holcomb, Prosecuting Attorney, *Daniel J. Gattermeyer* and *Daniel G. Eichel*, Assistant Prosecuting Attorneys, for appellee.

James Kura, Ohio Public Defender, *John A. Bay* and *Kris H. Walker*, Assistant Public Defenders, for appellant.

HERBERT R. BROWN, J. The single issue before the court is whether the statement "We want to talk to you about Bobby Bennett" is a "further interrogation" prohibited by *Edwards*

v. *Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378. *Edwards* and its progeny have established a bright-line test for dealing with defendants who invoke their right to counsel. Simply stated, if a defendant requests counsel, the police must stop all questioning and interrogation immediately. Any statement, question or remark which is "reasonably likely to elicit an incriminating response" is an interrogation. *Rhode Island* v. *Innis* (1980). 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-1690, 64 L.Ed.2d 297, 308.

Although the court of appeals correctly stated the law it erred in applying it. The appeals court held that the statement "We wanted to talk to you about Bobby Bennett," made after the defendant had requested counsel, was not an interrogation. For the reasons which follow, we disagree. The use of statements made by the defendant after his request for an attorney violated his right under the Fifth and Fourteenth Amendments (as set forth in *Edwards*, *supra*) to have counsel present during custodial interrogation.

In *Miranda* v. *Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 36 O.O.2d 237, the United States Supreme Court held that when a defendant requests an attorney, the police must stop interrogation until an attorney is present. "Interrogation" has been defined as including "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (Footnotes omitted.) *Rhode Island* v. *Innis* (1980), 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-1690, 64 L.Ed.2d 297, 308. It is not necessary to phrase the communication in the form of a question to constitute an interrogation.

Once a defendant invokes his right to counsel, police may talk to him only if the defendant himself initiates further communications. *Edwards* v. *Arizona*, *supra*. "This 'rigid' prophylactic rule * * * embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. * * * Second, if the accused invoked his right to counsel, courts may admit his responses to further

questioning only on the finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." (Citations omitted.) *Smith* v. *Illinois* (1984), 469 U.S. 91, 95, 105 S.Ct. 490, 492-493, 83 L.Ed.2d 488, 493-494. This bright-line test prevents the police from wearing down and confusing the defendant to obtain a waiver of his rights. *Id.* at 98, 105 S.Ct. at 494, 83 L.Ed.2d at 495-496.

The *Edwards*, bright-line prophylactic rule is equally applicable to "police-initiated interrogation following a suspect's request for counsel). * * * in the context of a separate investigation." *Arizona* v. *Roberson* (1988), 486 U.S. 675, 682, 108 S.Ct. 2093, 2098, 100 L.Ed.2d 704, 714. Once counsel is requested, the police may not question the defendant regarding any crime until an attorney is present.[1] If they do, they violate the defendant's consitutional rights and any statement obtained cannot be used.

In the present case, the defendant, Knuckles, requested counsel immediately after the police read him his rights. At this point questioning should have stopped. However, the police "informed" Knuckles that they only wanted to talk to him about Bobby Bennett, not the bad checks charge he was arrested for. There are several factors which require the holding that the statement "We want to talk to you about Bobby Bennett" was an interrogation prohibited by *Edwards*.

First, the only reason Knuckles was arrested was so the police could talk to him about Bennett's murder. They had no intention of pursuing the bad checks charge. The statement was more than the "offhand remarks" in *Innis*, *supra*, 446 U.S. at 303, 100 S.Ct. at 1691, 64 L.Ed.2d at 309, which were found not "reasonably likely to elicit an incriminating

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[1] The court of appeals cited *McNeil* v. *Wisconsin* (1991) 501 U.S. ____, 111 S.Ct. 2204, 115 L.Ed.2d 158, for the proposition that a request for counsel is offense-specific. *McNeil* concerns the Sixth Amendment right to have counsel present at adversarial hearings. The case before us deals with the Fifth Amendment right to have counsel present during interrogation to guard against self-incrimination. *McNeil* is not applicable to this case.

response." "[W]here a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Id.*, 446 U.S. at 302, 100 S.Ct. at 1690, 64 L.Ed.2d at 308, fn. 7.

Second, even if the arrest for the bad checks charge had not been a pretext for bringing Knuckles in to talk about Bennett's murder, the statement was still interrogatory in nature. The statement invited a response.

Finally, the rule in *Edwards* was adopted to avoid cases such as this. The prosecution argues the statement was made simply to advise Knuckles of the subject matter the police wanted to discuss. However, *Edwards* gives the police a rigid bright-line rule for dealing with suspects who have invoked their right to counsel.

As we said in *State* v. *Williams* (1983), 6 Ohio St.3d 281, 6 OBR 345, 452 N.E.2d 1323, at paragraph four of the syllabus: "Once an accused invokes his right to counsel, all further custodial interrogation must cease and may not be resumed in the absence of counsel unless the accused thereafter effects a valid waiver of his right to counsel or himself renews communication with the police." The bright-line rule established in these cases eliminates the need for *ad hoc* determinations by the courts regarding what communications with a defendant are permissible once counsel is requested. It removes uncertainty by stopping all interrogation. It clearly tells the police what cannot be done.

This is not to say that once a suspect requests counsel the police may not ask routine questions necessary for booking. *Pennsylvania* v. *Muniz* (1990), 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528. But even these questions are limited. In *Muniz* the court allowed questions regarding the defendant's name, address, height, weight, eye color, date of birth, and current age. It did not allow a question asking the date of defendant's sixth birthday. The statement made to Knuckles, after he had asked for counsel, was not a routine booking question.

Accordingly, we hold that the statement "We want to talk to you about Bobby Bennett" was an interrogation prohibited by *Edwards*. The judgment of the court of appeals is reversed and the cause is remanded.

Judgment reversed
and cause remanded.

MOYER, C.J., SWEENEY, DOUGLAS and WRIGHT, JJ., concur.

HOLMES and RESNICK, JJ., separately dissent.

HOLMES, J., dissenting. Although I am in agreement with the law as stated in the syllabus of this opinion, I respectfully dissent because of the majority's failure to properly apply the law to the facts of the instant appeal.

As correctly stated at the outset of the majority's opinion, the crucial issue for our discussion is whether appellant was subjected to "interrogation" within the meaning of *Rhode Island* v. *Innis* (1980, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297. There, the United States Supreme Court construed "interrogation" more broadly than meaning police questioning of the suspect. The Fifth Amendment privilege against compulsory self-incrimination could not adequately be safeguarded unless law enforcement officials were also prohibited from conduct which amounted to the "functional equivalent" of express questioning. Accordingly, the court held: "[T]he definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." (Emphasis *sic.*) *Id.* at 302, 100 S.Ct. at 1690, 64 L.Ed.2d at 308.

The *Innis* court, in finding that no interrogation took place, rejected any definition of "interrogation" which focused *exclusively* on the existence of police compulsion, however subtle it may have been.[2] However, the suspect's

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[2] See *Innis* at 303, 100 S.Ct. at 1691, 64 L.Ed.2d at 309:

"The Rhode Island Supreme Court erred, in short, in equating 'subtle

response must, in addition, have been "the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response." *Id.* at 303, 100 S.Ct. at 1691, 64 L.Ed.2d at 309. If the suspect's statements were not evoked as a result of police compulsion, then the second prong of the definition of "interrogation" has not been satisfied. In other words, we must look to the reasonable perceptions of the suspect in determining whether he or she was subjected to "interrogation." If a suspect would reasonably feel that the police conduct or words did not call for a response, no interrogation can be said to have taken place.

I am confused and troubled that the majority has chosen to characterize the statement "We wanted to talk to you about Bobby Bennett" as an interrogation. This statement was not a question, nor can it be considered to be the functional equivalent of express questioning. Nothing in this remark could have been reasonably perceived by appellant (a forty-two-year-old former deputy sheriff) as calling for a response, let alone a waiver of *Miranda* rights and the initiation of his subsequent conversation. Moreover, there is ample evidence in the record which strongly suggests that appellant welcomed this comment as an opportunity to mislead the police investigation through his deceptive theories on who shot the victim. Appellant's subsequent incriminating remarks were more likely evoked by his desire to lead the police astray than they were by his perception that the officer wanted him to speak. In this sense, the comment did strike a "responsive chord," thereby permitting appellant to say what he wanted about his version of the Bennett murder.

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compulsion' with interrogation. That the officers' comments struck a responsive chord is readily apparent. Thus, it may be said, as the Rhode Island Supreme Court did say, that the respondent was subjected to 'subtle compulsion.' *But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.* This was not established in the present case." (Emphasis added.)

What the majority characterizes as a "bright-line rule" emanating from *Innis* and its progeny is, in effect, the inevitable result of the majority's misapplication of the nuances of the constitutional privilege against compulsory self-incrimination. The majority goes far beyond safeguarding this privilege by unnecessarily crafting what amounts to an anticommunication obligation on the part of police officers. By this reasoning, any communication other than that usually attendant to arrest and custody will amount to "interrogation." Also, by this reasoning, the forseeability of the incriminating response is irrelevant—what matters is only that the arrestee began to talk.

Accordingly, I would affirm the court of appeals.

ALICE ROBIE RESNICK, J., dissenting. This case presents a striking example of a court taking a rational rule of law developed under s specific set of circumstances, blindly applying that rule of law to a completely dissimilar set of circumstances, and reaching a totally illogical conclusion. Consequently, because I am dismayed by the majority's result, I dissent. I would affirm the judgment of the court of appeals, and affirm defendant's conviction.

The court of appeals correctly concluded that the statement "We wanted to talk to you about Bobby Bennett" was not an interrogation. The appellate court properly grasped the circumstances surrounding that statement and recognized it for what it was; the mere recitation of a fact uttered by a police officer who was terminating the questioning of a suspect. This statement was in no way "reasonably likely to elicit an incriminating response" in the sense of *Rhode Island* v. *Innis* (1980), 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297. The majority's declaration that the statement "invited a response" is unsupported by the record.

In disagreeing with the court of appeals' conclusion on the significance of this statement, the majority ignores important facts and selectively emphasizes irrelevant ones (such as police motivation in bringing defendant in for questioning). Defendant's response to the statement at issue clearly indicates that

the statement cannot be accurately characterized as an interrogation. Defendant responded, "Oh, I thought you wanted to talk about the bad check warrants * * *. I don't want to talk about the bad checks, but I can talk to you about Bobby Bennett's death. * * *I love that man. As a matter of fact, I have got a couple theories on who may have done it that you guys would probably be interested in."

The court of appeals correctly understood the significance of defendant's remarks, when considered in the context of the accompanying circumstances of this case. Defendant was at one time a deputy sheriff. Testimony at trial indicated that someone had altered the firing pin and barrel of the alleged murder weapon, which was discovered in the trunk of defendant's car, in an attempt to preclude any chance of police matching that handgun with bullets removed from the victim's body. Clearly, defendant responded enthusiastically when the Bennett murder was mentioned. It may be easily deduced that defendant obviously believed he had outwitted the authorities, and was anxious to perfect the deception. Thus, the record reveals that the statement by the police officer referring to Bobby Bennett was not a "further interrogation." Therefore, defendant's response was offered voluntarily. No violation of *Miranda* v. *Arizona* (1966), 387 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 36 O.O.2d 237, occurred.

The majority states that the decision in *Edwards* v. *Arizona* (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, is designed to avoids cases such as this by giving a bright-line rule to follow. However, application of the *Edwards* rule is dependent on an initial determination that an interrogation has occurred. Since the majority is incorrect when it finds that an interrogation occurred, its resort to the *Edwards* bright-line rule is likewise flawed.

It is unfathomable how the majority could find that defendant's *Miranda* rights were violated in these circumstances. The majority correctly recognizes that the *Edwards* test "prevents the police from wearing down and confusing the defendant." *Smith* v. *Illinois* (1984) 469 U.S. 91, 98, 105 S.Ct. 490, 494, 83 L.Ed.2d 488, 495-496. However, *Edwards*

is irrelevant here. It is glaringly obvious that no intimidation of the defendant, either overt or subtle, by police occurred. Instead, defendant, a former deputy sheriff, seized upon the opportunity presented by an innocuous statement and offered unsolicited incriminatory remarks.

In conclusion, the two syllabus paragraphs are correct statements of basic hornbook law. However, the majority is mistaken when it finds that under the *Innis* standard, as set forth in the second syllabus paragraph, further interrogation occurred in the circumstances of this case. The majority's result is based on a skewed view of the events that took place. I vigorously dissent.

THE SUPREME COURT OF OHIO
1992 TERM
To wit: December 15, 1992

Case No. 91-1838

APPEAL FROM THE COURT OF APPEALS

State of Ohio,

Appellee,

v.

John C. Knuckles, Sr.,

Appellant.

JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Butler County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and the cause is remanded consistent with the opinion rendered herein.

It is further ordered that the appellant recover frm the appellee its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Butler County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Butler County for entry.

COSTS:

Motion Fee, Affidavit of Poverty filed.

(Court of Appeals No. CA8911159)

/s/ THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO
1993 TERM
To wit: January 27 1993

Case No. 91-1838

State of Ohio,

Appellee,

v.

John C. Knuckles, Sr.,

Appellant.

REHEARING ENTRY
(Butler County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby denied.
(Court of Appeals No. CA8911159)

/s/ THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

CASE NO. CA89-11-159

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JOHN C. KNUCKLES, SR.,
Defendant-Appellant.

OPINION
(Filed July 15, 1991)

John F. Holcomb, Butler County Prosecuting Attorney, Daniel G. Eichel and Daniel J. Gattermeyer, 216 Society Bank Building, Hamilton, Ohio 45011, for plaintiff-appellee.

Fred S. Miller, 300 Dollar Federal Building, Hamilton, Ohio 45011, for defendant-appellant.

JONES, P.J., At approximately 1:00 p.m. on Monday, January 30, 1989, the body of Bobby Bennett was discovered on the living room floor of his home at 811 Maple Avenue in Hamilton, Ohio. When discovered, Bennett was wearing a light windbreaker jacket and had his keys in his right hand. Although the victim's wallet was still in the left rear pocket of his trousers, it contained no cash; the victim's other pockets contained $2.26 in coins.

A coroner's investigation determined that Bennett died between 10:00 a.m. and noon on January 30. Death was attributed to gunshot wounds to the back and side of the head which were inflicted at close range by a .25 caliber firearm. The coroner removed two. 25 caliber bullets from the victim's head. In addition, police recovered two "Federal" brand .25

caliber cartridge casings from the living room floor of Bennett's home.

On the morning of January 30, Bennett ate breakfast at Smith's Donut Shop where he was a regular customer. Bennett paid for his $3.34 meal with a $20 bill. Bennett received change of $16 in paper currency and the remainder in coin. As Bennett left the restaurant shortly before 11:00, the waitress who served him both that morning and on numerous occasions in the past saw Bennett reach for his wallet where she knew he usually kept his paper currency.

After leaving Smith's, Bennett drove to Fackey's Service Station at the corner of East Avenue and Ludlow Street, a few blocks from his home, arriving at approximately 11:00 a.m. The station's owner, Charles Fackey, knew Bennett who had been a regular customer for twenty-five to thirty years. As Fackey was pumping gasoline into Bennett's vehicle, he saw a dark blue 1983 Renault Alliance traveling southbound on East Avenue at a high rate of speed. The Renault braked to a sudden stop and entered the station directly behind Bennett's vehicle. The Renault's driver, who Fackey later identified as defendant-appellant, John C. Knuckles, Sr., opened his door and leaned out of the car. Fackey heard Bennett tell appellant, "Go on over to the house, I will be right there in a minute, just go on over to the house." Appellant then slowly backed out of the station and headed north on East Avenue in the direction of Bennett's house at a very slow rate of speed. Fackey filled Bennett's tank and Bennett charged the $16 fill-up to his account. Bennett left the station and headed in the direction of his home, never to be seen alive again.

Appellant was well acquainted with the victim since Bennett was formerly married to appellant's sister. Appellant's relationship with Bennett had once been close, but appellant's recent increased use of drugs and the need to support it by borrowing money had strained his relationship with Bennett. The day before his death, Bennett telephoned his daughter in Germany and told here that he "wasn't going to loan [appellant] andy more money because he would use it for drugs." On Friday, January 27, Bennett cashed his payroll check and

received $290 after paying his telephone bill. Bennett habitually carried cash in his wallet, and although he normally paid cash for his gasoline purchases at Fackey's, Charles Fackey stated that Bennett would sometimes charge his purchases because he "want[ed] to keep a little money in [his] wallet."

At approximately 9:30 a.m. on January 30, appellant called his sister, Juanita Scenters, and asked to borrow a .25 caliber Raven automatic pistol from her ex-husband. Appellant claimed he needed the handgun for protection because he intended to collect money from some individuals in New Miami who were in debt to him. Wesley Scenters, the owner of the handgun, consented to appellant's request after appellant assured him he would not use the weapon but only wanted it for "backup." Shortly after 10:00 a.m., appellant arrived at Wesley Scenters' residence. Scenters' Raven — a brand new handgun which had never been fired — was loaded with six rounds from a new box of Federal brand ammunition which contained twenty-five cartridges. Later that evening, when appellant told Scenters he knew an individual who was interested in purchasing the Raven, Scenters gave appellant the box and remaining Federal cartridges.

Following the homicide, Hamilton police began looking for appellant since he was Bennett's former brother-in-law and drove a blue Renault Alliance similar to the one seen at Fackey's station shortly before the murder. In addition, appellant was wanted on several warrants for thirty-six counts of passing bad checks. Shortly after midnight on January 31, an unmarked detective unit on patrol in the north side of Hamilton observed a blue Renault operated by appellant. The officers followed the vehicle until appellant parked in a lot near Sixth and Heaton Streets. The officers approached appellant and asked if he was John Knuckles. Appellant identified himself as Joe Ralston and produced a social security card for one Joe Ralston from the trunk of his car. Appellant told the officers he was driving Knuckles' car because Knuckles wanted to avoid apprehension for the bad checks. Appellant offered to go get Knuckles who he claimed was

across the street at the apartment of one Delores Head. Shortly thereafter, additional officers who recognized appellant as a former Butler County Deputy Sheriff arrived and made a positive identification. Appellant was arrested on the outstanding warrants for passing bad checks and transported to the Hamilton Police Department.

After officers read appellant his *Miranda* rights, appellant informed the police that he wanted to speak with an attorney. Thereupon, one of the officers stated: "We wanted to talk to you about Bobby Bennett." Appellant remarked that he thought the police wanted to talk about the bad check warrants. Appellant stated that he would not talk about the bad checks but indicated that he would talk about Bennett's death and even had his own theories as to who killed Bennett. Appellant then signed a statement waiving his rights and spoke with the police.

When a detective entered the room to swab appellant's hands for an atomic absorption test, appellant told the police they would find gun powder residue on his hands since he had been test-firing the borrowed Raven outside his home in neighboring St. Clair Township. Pursuant to a search warrant, police found the Raven in the trunk of appellant's car. When appellant later saw the weapon on a desk in the police station, he stated: "If that gun killed Bobby Bennett, you have got your man. * * * I have had the gun. I have had control of it. * * * [But] the gun will not match. It's not the gun." Police also recovered the following items from the trunk of appellant's automobile: a wallet belonging to John Knuckles containing $94 in cash, four brown vials containing cocaine, one twenty-five count box of Federal brand ammunition containing sixteen rounds of Federal .25 caliber ammunition and six rounds of Remington brand .25 caliber ammunition. In addition, officers who later went to appellant's home found bullet holes in the soil and seven Federal brand .25 caliber cartridge casings on the ground. Using a shovel, the officers also recovered one .25 caliber bullet from the yard.

The Raven handgun found in the trunk of appellant's car, the two .25 caliber casings found in the victim's house, the two .25 caliber bullets recovered from the victim's body, the seven .25 caliber casings found outside appellant's house, and the one .25 caliber bullet removed from appellant's yard were all submitted to the Ohio Bureau of Criminal Identification and Investigation ("BCI") for ballistics analysis. Results indicated that there had been attempts to deliberately alter the breech face, firing pin, and barrel of the Raven handgun. The alterations to the barrel were sufficient to preclude any conclusive finding that the bullets removed from Bennett's body had been fired from the Raven found in appellant's vehicle. In addition, the firing pin had been altered to the point where use of the weapon before and after the altercation would result in different firing pin impressions on the cartridge casings. The tests did, however, result in positive identification with respect to the breech face impressions on all cartridge cases submitted for analysis.

Despite the attempted alterations to the handgun, the BCI test results indicated that the two bullets removed from the victim's body and the bullet recovered from appellant's yard had been fired from the same firearm. In addition, the bullets which killed Bennett and the bullet from appellant's yard *could* have been fired from the Raven found in appellant's automobile since these three bullets and those testfired from the Raven at BCI had matching class characteristics and some matching individual characteristics. The analysis also indicated that the two cartridge casings found at the homicide scene had been fired from the Raven handgun prior to any attempt to alter the weapon's firing pin and breech face. Furthermore, the seven cartridge casings removed from appellant's yard had been fired from the same Raven after the attempted alteration of the firing pin and breech face.

Appellant was quite familiar with firearms. He bought and sold guns, went to gun shows, and did quite a bit of hunting and target shooting. Appellant regularly fired guns outside his home, and had a small room in his house in which he worked on firearms and ammunition.

Appellant was indicted for the aggravated murder of Bobby Bennett in violation of R.C. 2903.01(B). In addition, appellant was indicted on one count each of aggravated robbery, tampering with evidence, and drug abuse. The aggravated murder charge was accompanied by a death penalty specification charging appellant with committing the murder while committing or attempting to commit aggravated robbery. In addition, both the aggravated murder and aggravated robbery charges contained additional specifications charging appellant with having a firearm on or about his person or under his control while committing the offenses. A jury found appellant guilty on all counts and specifications. During the penalty phase, the jury recommended life imprisonment for the aggravated murder charge. The trial court accepted the jury's recommendation and sentenced appellant to life imprisonment with no possibility of parole for thirty years. Appellant received an additional three year term of actual incarceration for the firearm specification. Appellant also received consecutive sentences on the aggravated robbery and tampering with evidence charges and a concurrent term on the drug abuse charge.

In a timely appeal, appellant asserts the following as error:

Assignment of Error No. 1:

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED HIS MOTION TO SUPPRESS HIS STATEMENT TO THE POLICE.

Assignment of Error No. 2:

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED HIS MOTION FOR ACQUITTAL ON THE AGGRAVATED ROBBERY SPECIFICATION AND ON THE CHARGE OF AGGRAVATED ROBBERY.

Assignment of Error No. 3:

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REFUSED TO ADMIT CERTAIN TESTIMONY BY APPELLANT'S MOTHER.

The issue to be decided in the first assignment of error is whether the trial court erred in denying appellant's motion to suppress statements he made to police following his arrest for passing bad checks. Appellant's position is that all statements which he made to police following his arrest are subject to suppression under *Miranda* v. *Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, and its progeny. According to appellant, once he requested and attorney, the police were obligated to suspend all further questioning until appellant had the opportunity to consult with an attorney or have one present during subsequent questioning.

When appellant was taken to the Hamilton Police Department, officers read him his *Miranda* rights. Appellant acknowledged that he understood his rights and immediately asked for an attorney, whereupon Detective Ronald Wells simply stated: "We wanted to talk to you about Bobby Bennett." Appellant immediately responded by stating that he was under the impression the police wanted to talk about the bad checks. Appellant then told the officers: "I'll talk to you about Bobby Bennett. I love that man." Appellant also told the officers that he had some information that would help in their investigation and that he even had his own theories as to who had robbed and killed Bennett. Wells then asked appellant if he would talk about Bennett without a lawyer present and appellant responded affirmatively. Appellant then signed a statement waiving his *Miranda* rights and gave a lengthy oral statement to police during which he incriminated himself.

In *Miranda*, *supra*, at 474, 86 S.Ct. at 1628, the United States Supreme Court held that once an individual in police custody invokes his right to counsel, "interrogation must cease

until an attorney is present." Furthermore, when the accused has expressed his desire to deal with police only through counsel, he is not to be subjected to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication with the police. *Edwards* v. *Arizona* (1981), 451 U.S. 477, 484-485, 101 S.Ct. 1880, 1885. *Edwards* therefore holds that it is "inconsistent with *Miranda* * * * for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.* See, also, *Arizona* v. *Mauro* (1987), 481 U.S. 520, 107 S.Ct. 1931. The Supreme Court has held that *Edwards*, *supra*, is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan* v. *Harvey* (1990), 494 U.S. 344, 110 S.Ct. 1176, 1180. See, also, *Smith* v. *Illinois* (1984), 469 U.S. 91, 98, 105 S.Ct. 490, 494. Thus, "[t]he rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick* v. *Mississippi* (1990), ____ U.S. ____, 111 S.Ct. 486, 489.

In *Smith* v. *Illinois*, *supra*, the Supreme Court held that the "rigid" prophylactic rule established in *Edwards* requires two distinct inquiries. "First, courts must determine whether the accused actually invoked his right to counsel. * * * Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on findings that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Id.* at 95, 105 S.Ct. at 492, 493. "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." *Id.* at 98, 105 S.Ct. 494.

It is readily apparent that appellant, having been informed of his rights, clearly and unequivocally requested an attorney. Although appellant was arrested on thirty-six counts of passing bad checks and informed of his rights with respect to those charges, the rule in *Edwards* applies when additional police-initiated interrogation following the suspect's request for counsel occurs within the context of separate investigation

for a different crime. *Arizona* v. *Roberson* (1988), 486 U.S. 675, 108 S.Ct. 2093. Thus, the fact that any subsequent interrogation may have focused on the Bennett homicide rather than the bad check charges does not allow the authorities to ignore appellant's request for counsel since "*Edwards* set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel." *Smith* v. *Illinois*, *supra*, at 98, 105 S.Ct. at 494.

Appellant's request for an attorney was immediately followed by Wells' statement: "We wanted to talk to you about Bobby Bennett." Since *Edwards* requires an end to all questioning and interrogation after the accused invokes his right to counsel, we must decide whether Wells' statement constituted questioning within the meaning of *Miranda*, thereby amounting to a violation of the prohibition against further questioning. Custodial interrogation within the meaning of *Miranda* means questioning initiated by law enforcement officials after the accused has been taken into custody. *Oregon* v. *Mathiason* (1977), 429 U.S. 492, 97 S.Ct. 711. The term "interrogation" refers not only to express questioning, but includes any words or actions on the part of the police, other than those normally attendant upon arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island* v. *Innis* (1980), 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-1690. The latter portion of this definition focuses primarily on the suspect's perceptions, rather than on the intent of the police. *Id.*

Although law enforcement officials may not question or interrogate an individual who has invoked his right to counsel, the prohibitions of *Miranda* do not go so far as to preclude all further communication with the accused. *Innis* states that police may continue to converse with a suspect so long as such conversation is attendant to arresting the suspect or taking him into custody. After officers arrested appellant on the bad check charges, they read him his rights as required by *Miranda* and appellant invoked his right to counsel. Wells immediately informed appellant that the officers wanted to talk

about Bobby Bennett. This statement obviously was not an express question. Nor was Wells' statement reasonably likely to elicit an incriminating response. If anything, Wells was explaining why appellant had been brought to the police station for questioning. Appellant then indicated that he was under the impression that the questioning was to focus on the bad check charges and expressed his willingness to talk about Bobby Bennett. Such reflects appellant's perception that the arrest and attendant interrogation were related to the bad check charges. *Innis, supra.* His subsequent actions reflect his limited request for counsel accompanied by his willingness to speak with authorities on another matter. See *Connecticut* v. *Barrett* (1987), 479 U.S. 523, 529, 107 S.Ct. 828, 832. Appellant was not threatened, tricked, or cajoled into subsequently waiving his right to counsel with respect to the Bennett homicide. Rather, appellant himself initiated further discussions on the topic by offering his views and theories regarding Bennett's death. "*Miranda* gives the defendant a right to choose between speech and silence, and [appellant] chose to speak." *Id.*

Once appellant indicated he would discuss the Bennett homicide, police took measures to ensure that appellant understood the ramifications of his decision. Officers first determined appellant's willingness to discuss the matter without an attorney present, then secured appellant's signature on a rights waiver form. Thus, not only did appellant initiate further discussions with the police, but he also knowingly and intelligently waived his right to counsel in doing so. *Smith* v. *Illinois, supra.*

Appellant, a former deputy sheriff, was hoist by his own petard. Having cleverly altered the weapon's firing pin, it is readily apparent that he thought he had thereby eluded detection and committed "the perfect crime." He simply couldn't wait to show up his former associates, and he eagerly embraced the opportunity to discuss the murder of his friend and former brother-in-law, secure in the knowledge that he had outwitted former colleagues. Appellant did not respond to a question, because no question was asked, and with his ex-

perience as a police officer in conducting interrogations and investigations, well knew the difference between a question and a statement. He had just claimed his *Miranda* rights, and demanded an attorney as to the forgery charges upon which he was arrested, a "specific offense."

A recent United States Supreme Court case, *McNeil* v. *Wisconsin* (June 13, 1991), 59 U.S.L.W. 4636, 1991 U.S. Lexis 4383, supports the conclusion that appellant's invocation of his Sixth Amendment right to counsel with respect to the forgery charges then pending did not constitute a waiver of his right to counsel with respect to circumstances surrounding Bennett's death. McNeil was charged with armed robbery in West Allis, Wisconsin. Following his arrest, McNeil was represented by a public defender at a bail hearing. While in jail on that charge, McNeil was questioned by police about a murder and related crimes in Caledonia, Wisconsin. McNeil was advised of his *Miranda* rights, signed forms waiving them, and made statements incriminating himself in the Caledonia offenses. McNeil was then formally charged with the latter crimes, his pretrial motion to suppress his statements was denied, and he was convicted. McNeil's conviction was upheld by the state supreme court holding that an accused's request for counsel on a *charged offense* does not constitute an invocation of his Fifth Amendment right to counsel that precludes police interrogation on *unrelated, uncharged offenses.*

The United States Supreme Court affirmed the conviction, holding that McNeil's invocation of his right to counsel with respect to the West Allis robbery posed no bar to the admission of his statements regarding the Caledonia crimes, with which he had not been charged at the time he made the statements. The court held that McNeil's Sixth Amendment right, which does not attach until the initiation of adversary judicial proceedings, is "offense-specific," and did not invalidate subsequent waivers during police-initiated questioning on other crimes.

We therefore conclude that the trial court correctly denied appellant's motion to suppress the oral statement he gave to

police following his arrest. We find no violation of *Miranda* or *Edwards* and, accordingly, overrule appellant's first assignment of error.

In his second assignment of error, appellant claims the trial court erred in denying his motion for a directed judgment of acquittal on the aggravated robbery charge and the aggravated robbery specification to the aggravated murder charge.[1] Appellant takes the position that his motion should have been granted since the state relied entirely on circumstantial evidence to prove the aggravated robbery and the state's evidence was not irreconcilable with a reasonable theory of innocence. The state's evidence showed that Bennett's wallet was empty even though he habitually kept cash in his wallet. There was also evidence that Bennett had $16 — and possibly even more money — on his person approximately one hour before his death. Appellant had borrowed money from the victim in the past although Bennett indicated the night before his murder that he would no longer be a source of funds for appellant. Appellant was also seen with Bennett at Fackey's service station shortly before the murder where Bennett told appellant to go to Bennett's house.

Appellant offers a reasonable theory of innocence supported by evidence that Bennett had to charge his gasoline purchase at Fackey's because he had no money, that Bennett's home showed no sign of having been ransacked or searched and no other valuables were taken from the premises, that the victim's wallet was found in its usual place in Bennett's pocket, that authorities also discovered $2.26 in coins and

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[1] In the table of contents of his brief, appellant's second assignment of error claims that the trial court erred in overruling appellant's "* * * MOTION FOR ACQUITTAL ON * * * THE CHARGE OF AGGRAVATED *MURDER*." (Emphasis added.) In the body of the brief, this assignment claims the court erred in denying the motion on the charge of "AGGRAVATED ROBBERY." The subsequent argument in appellant's brief is entirely directed towards the aggravated robbery charge and specification, with no attention given to the underlying murder charge. We therefore discuss the second assignment of error within the context of the aggravated robbery charge.

three packs of cigarettes in Bennett's other pockets. Appellant also offered evidence that on the morning of the murder he passed additional bad checks to obain cash for his drug habit, thereby eliminating any need to rob Bennett.

A trial court shall not order an entry of a judgment of acquittal under Crim. R. 29 if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of the charged offense has been proved beyond a reasonable doubt. *State* v. *Thomas* (1980), 61 Ohio St. 2d 223, 232-233; *State* v. *Bridgeman* (1978), 55 Ohio St. 2d 261. "A fact may be proved to a moral certainty by circumstantial as well as direct evidence." *State* v. *Hankerson* (1982), 70 Ohio St. 2d 87, 91, certiorari denied (1982), 459 U.S. 870, 103 S.Ct. 155. In order to prove an essential element of a crime by circumstantial evidence, the evidence must be irreconcilable with any reasonable theory of the defendant's innocence. *Id.*, at 92; *State* v. *Kulig* (1974), 37 Ohio St. 2d 157.

> Whether a theory of innocence is reasonable must be determined in view of the weight and credibility that the fact-finder gives the evidence, and an appellate court can reverse a conviction based on circumstantial evidence only where the evidence is insufficient as a matter of law to enable the fact-finder to exclude a reasonable hypothesis of innocence.

State v. *Hankerson*, *supra*, at 92; *State* v. *Graven* (1978), 54 Ohio St. 2d 114, 119.

In reviewing a ruling on a Crim. R. 29 motion, a court of appeals will construe the evidence in a light most favorable to the state. *State* v. *Wolfe* (1988), 51 Ohio App. 3d 215; *State* v. *Woods* (1985), 25 Ohio App. 3d 35. Construing the evidence in a light most favorable to the state, the jury could have concluded that because of his close acquaintance with the victim, appellant knew where Bennett kept his money at home and, having met Bennett at his home and in need of additional cash to purchase drugs, shot Bennett and took his

cash when Bennettt refused to loan appellant any additional money. Such would explain why Bennett's house was not ransacked and why no additional property was taken. The shell casings found at the homicide scene were fired from the Raven handgun appellant borrowed earlier that day, and which was subsequently altered to eliminate the weapon's connection with the Bennett homicide. The question is whether the circumstantial evidence is sufficient to support a finding beyond a reasonable doubt that appellant shot the victim while committing or attempting to commit an aggravated robbery. We hold that the evidence satisfies this standard and accordingly conclude that the trial court did not err in denying appellant's Crim. R. 29 motion. For these reasons, the second assignment of error is overruled.

In his third assignment of error, appellant claims the trial court erred by excluding the testimony of appellant's mother, Lila Gabbard, regarding two telephone conversations she allegedly had with the victim the night before and morning of the homicide. As proffered by defense counsel, Gabbard testified that a conversation she had with Bennett on Sunday night, January 29, was interrupted at 11:00 p.m. when Bennett said, "I am going to have to go, there is someone knocking at my door." The following morning at approximately 9:50 a.m., Gabbard was speaking with Bennett when Bennett told her someone was at the door. When Gabbard reminded Bennett of the similar interruption the night before, Bennett said: "Yes * * * That was Joyce's boyfriend, * * * He come and wanted some money. * * * I told him I didn't have any money." The trial court sustained the state's hearsay objection regarding the substance of the conversation, but permitted testimony that the conversations occurred and testimony of their dates and times.

Appellant argues that Gabbard's testimony is no different than that of Bennett's daughter, who testified about a conversation she had with her father the night before his murder during which he conveyed his decision not to loan any more money to appellant. Although the statements of both witnesses constitute hearsay, the daughter's testimony in-

cluded a statement of relevant future intent while Gabbard's testimony included statements by the declarant of past events or historical facts. According to appellant, however, such is "a distinction without a difference" and Gabbard's testimony, like that of Bennett's daughter, should have been admitted. We disagree.

Evid. R. 803(3) provides that hearsay is admissible if it constitutes:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

This exception to the exclusion of hearsay evidence is predicated upon the recognition that the declarant's statements of relevant future intent are probative evidence of the occurrence of subsequent relevant conduct by the declarant. *Mutual Life Insurance Co.* v. *Hillmon* (1892), 145 U.S. 285, 12 S.Ct. 909; *State* v. *Meyers* (Apr. 16, 1984), Warren App. No. CA83-06-043, unreported. The statements do not constitute proof that the declarant actually acted in conformity with his expressed future intent. They are, however, evidence of the declarant's intent to act in such a manner, and makes it more probable that he acted accordingly than if there had been no proof of such intention. *Hillmon*, *supra*.

Bennett's statement to his daughter which reflected his future intent not to loan appellant any more money for the purchase of durgs was admissible under Evid. R. 803(3) as evidence of Bennett's intent. *State* v. *Brewer* (1990), 48 Ohio St. 3d 50, 61, certiorari denied (1990), ____ U.S. ____, 111 S.Ct. 218; *State* v. *Sage* (1987), 31 Ohio St. 3d 173, 182. The statements to Gabbard, however, did not reflect Bennett's future intent, but only conveyed past events or historical facts which are not included in the exception of Evid. R. 803(3).

The admission or exclusion of testimony is within the sound discretion of the trial court. *State* v. *Sage*, *supra*, at 182. An appellate court will not disturb the trial court's discretion absent a showing that the defendant has suffered material prejudice. *Id.* We find no prejudice to appellant and therefore refuse to disturb the trial court's ruling regarding the exclusion of Gabbard's testimony. For these reasons, appellant's third assignment of error is hereby overruled.

Judgment affirmed.

YOUNG, J., concurs.

WALSH, J., dissents.

WALSH, J., dissenting. I dissent in the majority's opinion.

As the following testimony from a sergeant present at appellant's questioning clearly indicates, appellant invoked his right to be free from interrogation:

> Q. Did he [appellant] sign the [*Miranda*] rights' card?
>
> A. Not right away. When the *Miranda* warning was read to him, he advised he did want to speak to an attorney.
>
> Q. And then what happened?
>
> A. Detective Wells made a statement that we wanted to talk to him about Bobby Bennett's death * * *.

Pursuant to the Supreme Court's bright line ruling in *Edwards*, the police were not allowed to interrogate him after he unequivocally asserted that right. Only where the accused himself has initiated interrogation after indicating a desire for access to counsel is interrogation without counsel permissible. *Minnick*, *supra*, at ____, 111 S.Ct. at 489. Given this rule, the pertinent question becomes: Did the statement, "We wanted

to talk to you about Bobby Bennett," which followed the invocation by him of his right to be free from interrogation prior to speaking to counsel, constitute an interrogation?

As the majority accurately points out, the statement was not in the form of an express question and, thus, did not constitute interrogation in the normal sense of the word. Thereafter, the majority goes on to cite *Innis, supra*, which broadened the term interrogation to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis, supra*, at 301, 100 S.Ct. at 1689-1690. Utilizing this test, the majority found that the "attendant" interrogation amounted to an exploration of the reason why the police had arrested appellant and, therefore, was not reasonably likely to elicit an incriminating response. It is with this conclusion that I disagree with the majority.

Any determination that a suspect's *Miranda* rights have been waived must include an examination of the "totality of the circumstances" surrounding the interrogation. *Colorado v. Spring* (1987), 479 U.S. 564, 107 S.Ct. 85. Furthermore, the intent of the police is not totally irrelevant in determining whether their words amounted to the functional equivalent of interrogation. Although the majority focused exclusively on appellant's perspective in rendering its conclusion, the intent of the police is also germane: "* * * for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Innis, supra*, at 302, 100 S.Ct. at 1690, fn. 7.

Focusing on the intent of the police at the time of appellant's arrest, it is apparent to me that they posed the statement to appellant in the hope of getting him to change his mind about not talking to them and thereby obtain incriminating responses from him. At the motion to suppress hearing, an officer testified that one of the reasons for bringing appellant down to the station was to talk with him about Bennett's death. Another officer testified at trial that

although they had warrants out for appellant for bad checks, they wanted to talk with him about Bennett. The facts surrounding appellant's arrest and questioning prove the truthfulness of the officers' statements. Three detectives, three officers and a sergeant participated in appellant's arrest for passing bad checks. Following the arrest, two detectives and the sergeant accompanied appellant to a room in the police station for questioning.

Based on the totality of these circumstances, I am reluctant to join in the majority's decision to classify Wells' statement as an attendant interrogation regarding the bad check charges. Evidence of the extensive police involvement surrounding appellant's arrest and questioning, coupled with their motive behind that arrest, renders the majority's conclusion incorrect. Given the operation of these forces, the fact that the police disguised their intentions to appellant by arresting him on some other unrelated charge should not camouflage the actuality that the statement was reasonably likely to elicit an incriminating response. For this reason, I would find that the statement amounted to a custodial interrogation violative of appellant's Fifth Amendment rights.

Furthermore, a recitation of both the Supreme Court's holding and the facts in *McNeil*, *supra*, refutes the majority's assertion that that case is dispositive of this issue. In *McNeil*, the defendant was formally charged with armed robbery and attended an arraignment regarding the charge where he invoked his *Sixth Amendment right to counsel*. Upon returning to jail, McNeil signed a *Miranda* waiver form and made several incriminating statements in response to police questioning concerning an unrelated crime in another jurisdiction. Based on those statements, the police charged McNeil with that offense. The Supreme Court rejected McNeil's claim that the earlier invocation of his *Sixth Amendment right to counsel* on the armed robbery charge constituted an invocation of his *Fifth Amendment right against self-incrimination* on the unrelated charge, after it noted that these two separate rights necessarily involve different interests.

Unlike McNeil, appellant did not attend an arraignment regarding the initial charge of passing bad checks where he invoked his *Sixth Amendment right to counsel*. In fact, at no time prior to the invocation of his *Fifth Amendment right to be free from interrogation* did appellant request the assistance of counsel for his defense *pursuant to the Sixth Amendment*. Based on this factual distinction alone, I would find *McNeil* inapplicable.

The Supreme Court's holding in *McNeil* likewise leads me to the same inevitable conclusion. Regarding McNeil's Fifth Amendment argument, the Court wrote:

> The fact that we have allowed the Miranda right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted *initially outside the context of custodial interrogation*, with similar future effect. (Emphasis added.)

As I see it, this language strictly limits the Court's decision to those situations where a suspect attempts to invoke his *Miranda* rights outside the circumstances surrounding the custodial interrogation. Given that appellant invoked his right at the beginning of questioning, this case fails to fall within the purview prohibited by *McNeil*. Under no circumstance does *McNeil* allow the police to question a suspect about an unrelated charge after that suspect has unequivocally asserted his right to cease future custodial interrogation during questioning. The majority's conclusion in this case is simply not permissible under any interpretation of *McNeil*.

I would further hold that the violation cannot be deemed harmless error. As cases dealing with harmless error doctrine indicate, it is a well-established rule that "errors of constitutional dimension are not *ipso facto* prejudicial." *State* v. *Williams* (1983), 6 Ohio St. 3d 281, 286. Some constitutional errors are "so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed

harmless, not requiring the automatic reversal of the conviction." *Chapman* v. *California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 827. Several federal appellate courts have held that the harmless error test is applicable to *Miranda* violations. See *Howard* v. *Pung* (1988), 862 F.2d 1348, 1351; *United States* v. *Ramirez* (1983), 710 F. 2d 535, 542. In order to be deemed nonprejudicial, the beneficiary of a constitutional error must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, *supra*, at 24, 87 S.Ct. at 828.

In the present case, the only evidence not obtained as either a direct or indirect result of the *Miranda* violation was the cartridge casings found at the homicide scene which the BCI expret determined had been fired from the gun prior to its alteration and which gun was subsequently found in appellant's car.

Appellant had invoked his Fifth and Sixth Amendment rights as provided for in the *Miranda* decision and the police thereafter improperly interrogated him, at which time appellant told the police that he had test fired the gun outside his home that night. Based on this statement, the police recovered bullets from appellant's yard which were used in a subsequent ballistic analysis to link appellant to the murder. In particular, the test results showed that those bullets recovered from the victim's body were fired from the same firearm. The analysis also revealed that cartridge casings found in appellant's yard had been fired from the gun after the gun had been altered. Since the state's case was built around circumstantial evidence, it cannot be said, beyond a reasonable doubt, that the information obtained from the bullets found in the yard did not contribute to appellant's conviction.

Quoting from Justice Brandeis' dissenting opinion in *Olmstead* v. *United States* (1928), 277 U.S. 435, 438, 48 S.Ct. 564, 575:

> In a government of laws, existence of the government will be imperiled if it fails to observe the laws

scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.

For this reason, I respectfully dissent.

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

CASE NO. CA89-11-159

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JOHN C. KNUCKLES, SR.,
Defendant-Appellant.

JUDGMENT ENTRY
(Filed July 16, 1991)

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App. R. 27.

Costs to be taxed in compliance with App. R. 24.

To all of which appellant, by his counsel, excepts.

/s/ FRED E. JONES
Presiding Judge

/s/ WILLIAM W. YOUNG
Judge